

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS L. WATSON and DEPARTMENT OF THE ARMY,
U.S. ARMY FORCES COMMAND, Fort Lewis, WA

*Docket No. 99-498; Submitted on the Record;
Issued April 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On September 23, 1997 appellant, then an electrician, filed a notice of traumatic injury and claim for compensation alleging that on October 24, 1996 he injured his left hip and lower back when he fell from a ladder in the performance of duty. Appellant did not stop work. On November 20, 1997 the Office requested additional information from appellant, including a medical report and diagnosis, and allowed 30 days for a response. On November 28, 1997 appellant submitted an initial evaluation and treatment plan dated August 22, 1997 reported by Janell Robertson, a physical therapist.

By decision dated December 23, 1997, the Office denied appellant's claim on the grounds that he had not established fact of injury. The Office accepted that the claimed event occurred as alleged but noted that appellant had not submitted rationalized medical evidence by a physician in support of his claim.

On January 20, 1998 appellant asserted his appeal rights and requested an examination of the written record through the Branch of Hearings and Review. Appellant clarified in his request that he had not missed time from work due to his alleged injury, but that the injury had required physical therapy. He acknowledged that he initially submitted a physical therapy report, but contended that he believed his submissions also included medical reports. Appellant submitted with his appeal request additional physical therapy notes outlining appellant's plan for treatment throughout July and August 1997 and documents containing various notations describing appellant's complaints of low back pain.

By decision dated May 14, 1998, the Office hearing representative affirmed the December 23, 1997 decision denying appellant's claim to compensation for failure to establish that he sustained an employment-related injury. The hearing representative pointed out that a note made on a referral authorization for physical therapy dated July 16, 1997 indicated that appellant's initial injury occurred in March 1997 from a fall from a ladder which caused low back pain, which was inconsistent with the date appellant indicated on his CA-1 form. Further, the signature on this authorization form was illegible, so it could not be determined whether a doctor offered this evaluation. The hearing representative further noted that reports provided by physical therapists cannot be considered medical evidence, as they are not physicians,¹ and because there seems to be only one document of record provided by a doctor, although the signature cannot be determined, the record offers no medical diagnosis of which to relate appellant's employment injury. The hearing representative determined on review of the written record that appellant failed to meet his burden of proof that he sustained an injury in the performance of duty.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury."² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.³

The Office, in determining whether an employee actually sustained an injury in the performance of duty, first analyzes whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. In this case, the Office accepted that the first component, the employment incident, occurred as alleged.⁴ The second component is whether the employment incident caused a personal injury and this generally can only be established by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁵

¹ *Sheila Arbour*, 43 ECAB 779 (1992).

² *Elaine Pendleton* 40 ECAB 1143, 1145 (1989).

³ *Id.*

⁴ *Id.*

⁵ *See* 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

In this case, appellant submitted, in support of his claim, an evaluation and treatment plan reported by a physical therapist, dated August 7, 1997, as well as other physical therapists notes dating from July 17 until August 22, 1997. A physical therapist is not a physician under the Act and is therefore not competent to give a medical opinion.⁶ The reports of appellant's physical therapist are of no probative value in establishing that appellant sustained a medical condition causally related to his work-related fall. Other than the physical therapy records, the only other medical documentation of record at the time of the December 23, 1997 and May 14, 1998 decisions was a form report completed by the St. Peter Family Practice Office on March 14, 1997, with an addendum note dated July 16, 1997. This form report contains only illegible signatures. Moreover, appellant has explained that this report was signed by a nurse practitioner. The Board has held that forms which lack a legible signature and therefore cannot be properly identified cannot be considered as probative evidence.⁷ Furthermore, a nurse is also not a physician under the Act, and therefore her report could not constitute probative medical evidence.⁸ Because appellant did not submit any medical opinion evidence, he failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

On June 19, 1998 in support of a request for reconsideration, appellant outlined again the nature of his injury and indicated that there was a witness to his fall. Appellant alleged that he had experienced great pain months after this injury and went to see DelRene Perkins, a registered nurse practitioner, at St. Peter Family Practice. He explained in this letter that Ms. Perkins was the person whose signature appeared illegible to the Office in previous documentation. Appellant attached a letter to his request signed by Ms. Perkins and Dr. Anne Montgomery, a family practitioner, dated June 16, 1998 and appellant requested that the Office review his record in its entirety. He closed his request letter to the Office by further suggesting that the Office conduct its own independent medical examination.

By decision dated July 31, 1998, the Office denied review of the prior decision on the basis that evidence submitted with appellant's reconsideration request was found to be cumulative, and insufficient to warrant review of the prior decision. The Office noted that the June 16, 1998 medical report by Dr. Montgomery was the only new piece of information received in support of appellant's claim, and that it contained the same information previously reviewed in the December 23, 1997 and May 14, 1998 decisions.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision

⁶ *Id.*

⁷ *Merton J. Sills*, 39 ECAB 572 (1988).

⁸ *Vicky L. Hannis*, 48 ECAB 538 (1997).

by the Office.⁹ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),¹⁰ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”¹¹

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹² Evidence which does not address the particular issue involved,¹³ or evidence which is repetitive or cumulative of that already in the record,¹⁴ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁵

In the instant case, the Office denied review of appellant's claim on July 31, 1998 on the grounds that the medical report alleged as new evidence was cumulative and did not provide

⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁰ *See Charles E. White*, 24 ECAB 85 (1972).

¹¹ 20 C.F.R. § 10.138(b)(1).

¹² 20 C.F.R. § 10.138(b)(2).

¹³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁵ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

additional medical evidence to warrant review. The Office had denied the claim because appellant's case record lacked a medical diagnosis and did not establish a causal relationship between a medical condition and the accepted incident. To obtain a merit review, appellant was required to provide new factual evidence or legal argument that a medical condition was causally related to the employment incident. Dr. Montgomery's medical report simply pointed to a previous doctor's visit that referenced appellant "fell from a ladder four months ago," and "pain is constant and daily." The report summarized that appellant aggravated or reinjured his low back by falling from a ladder where he landed on his left side on his claw hammer, and that appellant suffered from left-sided pain with resisted left leg extension. This report did not offer a medical diagnosis or a rationalized medical opinion causally relating appellant's condition to his employment-related fall. Furthermore, appellant's allegations that his supervisor and witness were not consulted, and that the Department of Labor had not acknowledged his injury simply do not address the deficiency of medical opinion evidence in this case.

The Board finds that none of the evidence submitted or arguments made constitute a basis for reopening appellant's claim for further merit consideration. Accordingly, the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits in its July 31, 1998 decision.

Consequently, the decisions of the Office of Workers Compensation Programs dated July 31, 1998 and December 23, 1997 are affirmed.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member